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6 UNITED STATES DISTRICT COURT

7 EASTERN DISTRICT OF CALIFORNIA

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9 RICHARD MARTINEZ,

CV F 02 6311 REC LJO P

10 Plaintiff,

ORDER DENYING MOTION TO ACCEPT
LATE FILING OF AMENDED RESPONSE TO
DEFENDANT'S ANSWER (Doc. 35.)

11 v.

12 CHALMERS, et. al.,

ORDER DISREGARDING MOTION
EXHAUSTING ALL REMEDIES (Doc. 36.)

13 Defendants.
14 _____/

15 Richard Martinez ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis
16 in this civil rights action filed pursuant to 42 U.S.C. § 1983.

17 On July 12, 2005, Defendants filed an Answer to the Amended Complaint. Plaintiff, on
18 September 7, 2005, moved for the Court to accept the late filing of his Amended Response to
19 Defendant's Answer. Plaintiff also filed a Notice of Motion and Motion exhausting all remedies.

20 The Federal Rules of Civil Procedure require that each case contain a Complaint and an
21 Answer. Fed.R.Civ.P. 7. The rules do not contemplate a Response to an Answer except in the
22 event the Answer makes a counterclaim. Fed.R.Civ.P. 7(a).

23 In this case, the Answer admits or denies allegations made in the Complaint and sets forth
24 Defendant's affirmative defenses. The Answer, however, raises no counterclaims against
25 Plaintiff. Thus, a Response to the Answer is unnecessary and Plaintiff's Motion will be
26 DENIED.

27 Plaintiff's Motion "Exhausting all remedies" will also be DISREGARDED. The purpose
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1 of this Motion is unclear however, it appears that Plaintiff may be wishing to allege that he has
2 exhausted his administrative remedies as Defendants have raised the affirmative defense of
3 exhaustion in their answer. Plaintiff need not address exhaustion at this stage in the proceedings.
4 Should Defendants move to dismiss the case on the basis of Plaintiff's alleged failure to exhaust,
5 Plaintiff may then file an Opposition to the Motion addressing the allegations made. However, at
6 this stage, Defendant's must raise each affirmative defense in their answer or it is waived. As
7 Defendant's have not moved for dismissal on exhaustion grounds, Plaintiff's pleading is
8 unnecessary.

9 Accordingly, the Court HEREBY ORDERS:

- 10 1. The Motion to Accept the Late Filing of Amended Response to Answer is
11 DENIED;
12 2. The Motion exhausting all remedies is DISREGARDED.

13 IT IS SO ORDERED.

14 **Dated: September 26, 2005**
b9ed48

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE